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No. 86-1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF ARIZONA,
Petitioner,
v.
CHICAGO TITLE INSURANCE CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a plaintiff class action certified under Rule 23 (b)(1) and (b)(2), did the court of appeals properly affirm the district court's exercise of its discretion in approving a proposed settlement as fair, adequate and reasonable which did not permit class members to opt out?

LIST OF PARTIES

The parties to the proceedings below were the State of Arizona, Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company, Stewart Title Guaranty Company, TICOR Title Insurance Company, William and Debbie Becker, Carl Bernstein, Terry Brandt, Anne L. Cunningham, Richard and Carol Hess, William R. McGee, Jr.,* Drew Milstein, Randal and Paula Pearson, David M. Pollick,* Dolores Sbroglia, and Weag Associates.

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* These individuals were omitted from the List of Parties in the Petition.

RULE 28.1 LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

CORPORATE RESPONDENTS

Respondent Chicago Title Insurance Company

Respondent Chicago Title Insurance Company is a wholly-owned subsidiary of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation.

Respondent First American Title Insurance Company

The parent company of respondent First American Title Insurance Company is The First American Financial Corporation.

Respondent Lawyers Title Insurance Corporation

The parent company of respondent Lawyers Title Insurance Corporation is Universal Leaf Tobacco Company, Incorporated, a publicly-owned corporation.

Respondent SAFECO Title Insurance Company

Respondent SAFECO Title Insurance Company is a wholly-owned subsidiary of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation.

Respondent Stewart Title Guaranty Company

The parent company of respondent Stewart Title Guaranty Company is Stewart Information Services Corporation. Other non wholly-owned subsidiaries or affiliates of Stewart Title Guaranty Company are listed in the Appendix hereto.

Respondent TICOR Title Insurance Company

Respondent TICOR Title Insurance Company is a wholly-owned subsidiary of TICOR Title Insurance Company of California, which is a wholly-owned subsidiary of TICOR. None of the outstanding common stock of TICOR is publicly traded. All of the outstanding preferred stock of TICOR is owned by New TC Holding Corporation, which is a wholly-owned subsidiary of Associated Madison Companies, Inc., which in turn is a wholly-owned subsidiary of Primerica.

Other Subsidiaries of Corporate Respondents

No subsidiary not listed herein of any corporate respondent which is not wholly owned has publicly-traded common stock.

OTHER RESPONDENTS

None of the remaining respondents is a corporation.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I. The issue before the Court.

These consolidated class actions were certified under Rule 23(b)(1) and (b)(2). The district court exercised its discretion to approve a settlement which was contingent upon the resolution of all related claims without any opt outs. The district court did so only after carefully scrutinizing the terms of the settlement and balancing the benefits achieved against the likely consequences of litigation on the merits:

> My conclusion therefore is that, based on the relevant factors, the settlement negotiated by the parties in this case is reasonable, fair and adequate. The settlement was negotiated for the plaintiff class by competent counsel who observed their duty to pro-

> tect the interests of the entire class and who had the benefit of extensive discovery when evaluating the case. The settlement they worked out provides substantial benefits to the entire plaintiff class when considered in light of the almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation. The complexity and expense of continued litigation only add to the legal difficulties plaintiffs faced on the merits of their claims. I find that the objections to the settlement are without merit and should not and do not prevent approval of the settlement.

In re Real Estate Title and Settlement Services Antitrust Litigation, 1986-1 Trade Cas. (CCH) ¶ 67,149 at 62,937 (1985), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987), reprinted in the Appendix to the Petition for Certiorari ("App. to Pet.") at 4a through 99a, 98a-99a.

The Court of Appeals for the Third Circuit refused to disturb the district court's finding and conclusions, affirming the district court's decision unanimously and summarily. The Attorney General of Arizona, nevertheless, asserts an absolute right to opt out of the class action on behalf of the State of Arizona.

The issue for this Court is whether the district court properly exercised its discretion in the circumstances of this litigation, and, thus, whether the court of appeal's decision affirming the district court was correct. Respondents believe that the district court's comprehensive and detailed opinion demonstrates that its exercise of discretion was proper. It is well-established that a reviewing court does not substitute its judgment for that of the district court with respect to approval of a class action settlement, but rather evaluates whether the district court abused its discretion:

> Such a determination is committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and

> their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Ace Heating & Plumbing Co. v. *Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971) (quoted with approval in *Reynolds* v. *National Football League*, 584 F.2d 280 (8th Cir. 1978); *see also City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 454-55 (2d Cir. 1974); *Moore* v. *City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980).

II. The class action claims.

Thirteen private antitrust class actions[1] were consolidated by the Judicial Panel on Multidistrict Litigation before Judge Donald W. VanArtsdalen of the United States District Court for the Eastern District of Pennsylvania. The complaints alleged that the six defendant

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[1] The private plaintiffs sought to represent a class defined, with minor variations among complaints, to include all persons and entities who had purchased title search and examination "services" and settlement "services" from the defendant title insurance underwriters in connection with real estate transactions in thirteen states, including Arizona. The plaintiffs contended that such "services" were not part of the business of insurance although the defendants performed these "services" in connection with issuing title insurance policies and the defendants considered these activities to be an integral part of the underwriting process.

The State of Arizona presumably is a member of the proposed plaintiff class by reason of its own purchases of such "services," although Arizona has never produced any evidence that it is a member of the class. The State of Arizona is not one of the named plaintiffs. No complaint defined a plaintiff class or subclass consisting solely of Arizona residents.

Before the district court and the court of appeals, Arizona purported to act as *parens patriae* on behalf of all Arizona residents who are members of the class, attempting to opt out on behalf of Arizona residents even though not one Arizona resident had objected to the settlement. It is unclear whether Arizona continues to maintain that position before this Court. Judge VanArtsdalen doubted the State's authority to do more than attempt to opt out on its own behalf. App. to Pet. at 27a-29a.

title insurance companies had violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), by participating in state-authorized rating bureaus which filed proposed rates with state insurance departments in thirteen states.[2] Each action sought to establish that the defendants could not legally file rates for title search and examination "services" and settlement "services" through state-authorized rating bureaus. The class actions were filed shortly after the Federal Trade Commission issued an administrative complaint under Section 5 of the F.T.C. Act, 15 U.S.C. § 45(a)(1) (1982), against the same title insurance companies concerning the same conduct.

The complaints sought both injunctive relief and treble damages. If the plaintiffs had pursued the claims to a successful conclusion on the merits, the district court would have had to craft injunctive relief affecting the manner in which defendants could participate in rating bureaus in the future, because the plaintiffs attacked as illegal only some, not all, rating bureau activities.[3] Indeed, injunctive relief might have been the only relief available to the class action plaintiffs even if they had been successful in establishing that defendants' conduct was illegal.[4]

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[2] The thirteen states were Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin, and Wyoming.

[3] For example, even the plaintiffs acknowledged that activities that constitute "the business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1012b, are immune from attack under the federal antitrust laws to the extent that those activities are regulated under state law. Accordingly, even if the plaintiffs had been successful in proving every activity challenged was illegal, the defendants still would be able to participate in rating bureaus under some circumstances and file some rates jointly. The litigation could not be resolved simply by an injunction prohibiting the defendants from participating in rating bureaus.

[4] The defendants had contended from the beginning of the litigation that, even if the class action plaintiffs were successful, the

III. The decisions below.

Largely because of developments in the law adverse to the plaintiff class,[5] the class representatives and the de-

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plaintiffs could obtain only equitable relief because of the "filed tariff doctrine," which was first announced in *Keogh v. Chicago and N.W. Ry.*, 260 U.S. 156 (1922). Under this doctrine, the class action plaintiffs could recover no money damages because the rates which the plaintiffs claimed had become the lawful rates pursuant to the regulatory systems enacted by the thirteen states.

In *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986), this Court reaffirmed the "filed tariff doctrine." The district court considered the potential applicability of the doctrine to this case in its decision. App. to Pet. at 76a-77a.

[5] Initially the class action plaintiffs contended that the defendants' participation in rating bureaus and the joint filing of rates for approval by state regulators would be activities protected under the "state action" doctrine only if state law "compelled" the conduct in issue. Shortly after the litigation commenced, however, this Court decided *Southern Motor Carriers Rate Conf.* v. *United States*, 471 U.S. 48 (1985), holding that it was not necessary for a private party to prove that its conduct was "compelled" by a state in order to establish "state action" immunity. In reaction to this decision, the parties engaged in discovery relating to the issue of active state supervision and began settlement negotiations. The district court recorded in detail these events in its opinion, App. to Pet. at 7a-18a, and extensively analyzed the results of discovery on the "state action" issue, App. to Pet. at 63a-73a, because it considered this Court's decision in *Southern Motor Carriers* on the state action doctrine to be "possibly dispositive" of the class action litigation, App. to Pet. at 10a.

However, *Southern Motor Carriers* was not the only basis for the district court's decision approving the settlement. The district court also discussed the possibility that all the activities in issue were immune from the antitrust laws by virtue of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), which exempts the business of insurance from antitrust attack, App. to Pet. at 7a, 73a-75a, concluding:

> [T]he McCarran-Ferguson Act also poses a very significant if not insurmountable obstacle to the establishment of liability against the defendants.

App. to Pet. at 75a. The district court considered as well the possibility that the plaintiffs could never recover monetary damages

fendants agreed to a proposed settlement and submitted it to the district court in January of 1986. The agreement provided that the settlement would become effective only if the district court certified a plaintiff class consisting of *all* members of the class under Rule 23(b)(1) and/or Rule 23(b)(2).[6] After six months of review, notice by publication, and a hearing on objections, Judge VanArtsdalen entered a decision certifying a settlement class under Rule 23(b)(1)(a) and (b)(2) and approving the settlement. In doing so, the district court concluded that the settlement "provides substantial benefits to the entire plaintiff class when considered in light of the almost insurmountable difficulties that the plaintiffs would have faced in obtaining any relief had they continued with this litigation." App. to Pet. at 98a-99a.

No resident of Arizona filed an objection to the settlement. Nor did the State of Arizona file an objection. Instead, the Arizona Attorney General ignored the procedures set forth by the district court for objections to be made and simply attempted to opt out. The Attorney General was the only member of the plaintiff class, estimated to number more than 3,400,000 persons, who attempted to opt out of the settlement negotiated by counsel for the class.[7] The Arizona Attorney General also

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because of the "filed tariff doctrine," App. to Pet. at 8a, 76a-77a (citing this Court's recent decision in *Square D*). *See infra* note 6.

[6] This provision was premised, in part, on virtually insurmountable obstacles to providing individual notice to each and every class member under Rule 23(b)(3), as explained in depth in the district court's decision. *See* App. to Pet. at 49a-52a. Such a requirement would have ruled out all possibility of settlement and required a full trial. The district court noted that, in all likelihood, the result would have been that class members received no benefits at all. *Id.*

[7] Approximately 600 members of the class responded to the notice by inquiring about the settlement, including 65 residents of Arizona. Only 20 individuals then filed objections to the settlement, none of whom was an Arizona resident. The attorneys general of

was the only class member to pursue an appeal of the district court's decision.[8]

By a March 3, 1987, Judgment Order, the Court of Appeals for the Third Circuit affirmed the district court's decision. The appellate court issued no opinion; apparently it concluded that the district court had exercised its discretion appropriately and had applied the proper legal standards. The Arizona Attorney General is the only member of the class who requests this Court's review of the Third Circuit's decision.

ARGUMENT

I. There is no conflict among the courts of appeals as to whether an absent class member has an absolute, constitutional right to opt out of a judicially-approved settlement in a Rule 23(b)(1) or (b)(2) class action.

The district court certified the class under Rule 23 (b) (1) because there was a serious risk that multiple lawsuits would lead to inconsistent obligations concerning defendants' rating bureau activities. App. to Pet. at 40a-42a. The district court also certified the class under Rule 23(b)(2) because the plaintiffs sought injunctive relief that would provide a remedy for the class as a whole and that became the primary, and perhaps exclusive, relief available to the plaintiff class. App. to Pet.

Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin filed the only other objection in the form of a joint memorandum in opposition to the proposed settlement. The Arizona Attorney General did not join in their memorandum, but rather filed a one-sentence request to opt out. The Arizona Attorney General later served the respondents with a three-page memorandum asserting a constitutional right to opt out, but it is not clear that this memorandum was ever filed with the district court. At no time before the district court did Arizona challenge the fairness of the settlement or the adequacy of representation.

[8] The Attorney General of Ohio initially filed a notice of appeal in the Third Circuit but later withdrew it.

at 43a-47a, 52a. After addressing every objection presented either in writing or at the hearing on the settlement, the district court found that the named plaintiffs had fairly and adequately protected the interests of the class and that the settlement was fair, adequate and reasonable. App. to Pet. at 52a-99a.

Given the circumstances of the settlement, which was contingent upon the final resolution of all related claims by class members, and given the strong public policy in favor of settlement of class actions, Judge VanArtsdalen exercised his discretion to approve the settlement, thereby denying the Attorney General of Arizona's request to opt out. The State Attorney General nevertheless claims a constitutional, due process right to opt out of this class action.

Over 45 years ago this Court announced the standard for judging whether absent members of a class have been accorded due process, stating:

> [T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

Hansberry v. *Lee*, 311 U.S. 32, 42 (1940). It is abundantly clear in this case that the district court adopted a procedure that well-protected absent class members. It included notice and opportunity to object in writing and at a hearing, as well as a determination that the class was adequately represented. Moreover, the district court scrutinized the settlement, applying the appropriate legal standards set forth in cases such as *Girsh* v. *Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975), *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); and *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

Arizona asserts, nevertheless, that there is a conflict among the courts of appeals as to whether absent class members have an absolute due process right to opt out of any class action seeking monetary damages. In making this argument, Arizona erroneously relies upon *Holmes* v. *Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), where the court of appeals reversed a district court order approving settlement of a Title VII antidiscrimination suit and denying requests to opt out. Neither the result nor the reasoning in *Holmes* are in conflict with the Third Circuit's decision, however.

In *Holmes*, the court of appeals explicitly rejected the argument that an opportunity to opt out must be provided as a due process right:

> The general rule in this circuit remains that absent members of (b)(2) classes have no automatic right to opt out of the lawsuit and to prosecute an entirely separate action. *See Penson* [v. *Terminal Transport Co.*], 634 F.2d [989] at 993 [(5th Cir. 1981)]; *Grigsby* v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457, 461 (5th Cir. 1978); *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286, 288 n.7 (5th Cir. 1975); *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1057 (5th Cir. 1975), *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1977).

706 F.2d at 1153. The court of appeals in *Holmes* simply reaffirmed the rule in that circuit that a decision to provide an opt out right to (b)(2) class members asserting monetary claims is a matter for the discretion of the district court, to be disturbed only for abuse of discretion. *Id.* at 1154-55. The court of appeals specifically stated that its decision was *not* based on due process grounds. *Id.* at 1160.

Furthermore, the result in *Holmes* depended upon a key factor not present in this case. The class representatives had negotiated a settlement in which they benefited

more than the absent members of the class whom they were representing. The Eleventh Circuit concluded that the settlement was not fair, adequate and reasonable because the named plaintiffs had arranged to take half of the total settlement fund and thus did not represent or protect the interests of the class as a whole. *Id.* at 1159-60. This conclusion compelled the appellate court to decide, in that context, that absent class members should have been permitted to opt out. *Id.* at 1155.

This litigation is completely different. In this case the class representatives will receive exactly the same benefits as every other member of the class under the settlement approved by the district court. Arizona may disagree with the other members of the class and with the district court about the value of the settlement and the risks and costs of further litigation. But that difference of opinion over the cost-benefit analysis of the settlement does not give rise to a conflict of interest between the class representatives and absent class members of the type that concerned the *Holmes* court.

Arizona has simply ignored the Eleventh Circuit's own words in *Holmes*:

> A back pay class in which all members are affected equally by a settlement would, of course, be sufficiently homogeneous to obviate any need for an opt out protection.

706 F.2d at 1158. Because all members of the plaintiff class in this litigation will receive the same benefits under the settlement, the reasons applied by the Eleventh Circuit in *Holmes* would not apply in this case.

Arizona also attempts to derive significance from the fact that some lower courts have denied any opt outs in class actions certified under Rule 23(b)(1) or (b)(2), while other courts of appeals, such as the *Holmes* court, have held that they have discretion to permit class mem-

bers to opt out of particular Rule 23(b)(1) or (b)(2) class actions. Arizona misses the point. Not one of the authorities cited by the Arizona Attorney General stands for the proposition that he asserts is in conflict with the Third Circuit's decision in this case—that there is an absolute right to opt out of a Rule 23(b)(1) or (b)(2) class.[9] Indeed, the courts of appeals have repeatedly denied requests to opt out of class actions certified under Rule 23(b)(1) or (b)(2), even if a claim for money damages is made in addition to claims for equitable relief.[10]

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[9] *See Penson* v. *Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981) (no right to opt out of (b)(2) class even where some monetary relief was involved); *Laskey* v. *Internat'l Union, United Auto., Aero. and Agri. Implant Workers*, 638 F.2d 954, 956 (6th Cir. 1981) (where a class claim could have been certified under (b)(2) or (b)(3) and the court certified a (b)(2) class, there was no right to opt out); *Bauman* v. *United States District Court*, 557 F.2d 650, 659-70 (9th Cir. 1977) (no right to opt out of a (b)(2) class, so no writ of mandamus would issue to compel district court to permit opt out); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (no right to opt out of (b)(2) class even after the dominant relief was no longer injunctive but monetary); *Air Line Stewards & Stewardesses Assoc.* v. *American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (no right to opt out of a (b)(2) class); *Walker* v. *Styrex Industries*, 21 Fed. R. Serv. 2d (Callaghan) 355, 358 (M.D.N.C. 1976) (court certified class and exercised discretion to order notice under provision applicable to (b)(3) class actions); *Women's Comm. for Equal Empl. Opp.* v. *National Broadcasting Co., Inc.*, 71 F.R.D. 666, 671, (S.D.N.Y. 1976) (court said notice in a (b)(2) action is discretionary and ordered notice permitting class members to opt out).

[10] *See, e.g., Walsh* v. *Great Atl. & Pac. Tea Co.*, 726 F.2d 956 (3d Cir. 1983) (due process is satisfied in a (b)(1) or (b)(2) case if the class is adequately represented and there is no right to opt out); *Van Gemert* v. *Boeing Co.*, 573 F.2d 733 (2d Cir.), *reh'g granted*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980) (members of plaintiff class certified under (b)(1) or (b)(2) had no right to opt out); *Robertson* v. *National Basketball Assoc.*,

II. The court of appeals' decision, affirming the district court's refusal to permit Arizona to opt out, does not conflict with this Court's decision in *Shutts*.

The Arizona Attorney General attempts to manufacture a reason for this Court to grant certiorari by arguing that the Third Circuit's decision conflicts with the Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). He is mistaken. There is no conflict.

Shutts was a plaintiff class action under the Kansas equivalent of Rule 23(b)(3) in which *only* a claim for damages was involved. The merits of the case concerned whether Phillips Petroleum owed approximately 28,000 identified members of the plaintiff class interest on royalty payments that Phillips had withheld for several years. The petitioner in *Shutts* asserted that Kansas lacked personal jurisdiction over class members not resident in Kansas and argued that Kansas could only acquire jurisdiction by using an "opt in" procedure (by which a class members would affirmatively elect to participate in the class). The Kansas court had permitted class members to opt out. This Court held that the "opt out" procedure which was used satisfied due process and was sufficient to give the Kansas court jurisdiction. Due process did not require an "opt in" procedure.

Thus, for many reasons the decision in *Shutts* does not stand for the proposition for which Arizona cites it. *Shutts*, unlike this case, involved a class certified under the state equivalent of Rule 23(b)(3). *Shutts*, unlike this case, involved only monetary relief. In *Shutts*, unlike this case, the lower court had permitted class members to opt out. For that reason the Court was not presented with the issue whether a refusal to permit someone to opt out was a denial of due process.

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389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682, 685-86 (2d Cir. 1977) (settlement of antitrust class action certified under Rule 23(b)(1) without permitting opt outs was appropriate).

This Court did not consider, much less decide, whether the Constitution requires that class members be allowed to opt out of a Rule 23(b)(1) or (b)(2) class action in circumstances such as the case at hand. Rather, it limited the scope of its decision to class actions wholly or predominantly for money damages, which, by definition, are certified under Rule 23(b)(3) and are different from Rule 23(b)(1) and (b)(2) class actions:

> Our holding today is *limited* to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class action lawsuits, such as those seeking equitable relief.

Shutts, 472 U.S. at 811 n.3 (emphasis added).[11] Thus, the Third Circuit's decision does not conflict with *Shutts*, and there is no authority for transforming all (b)(1) and (b)(2) class actions into (b)(3) actions by insisting that there is an absolute right to opt out if money damages are sought in the complaint as well as equitable relief.

III. A decision in favor of petitioner would destroy the settlement, thereby denying millions of people the benefits of the class action settlement that they now expect to receive.

The Arizona Attorney General argues that this Court should grant certiorari because the decisions of the courts below "Adversely Affect A Substantial Number

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[11] *Accord, Avagliano* v. *Sumitomo Shoji America, Inc.*, 107 F.R.D. 748, 749 (S.D.N.Y. 1985) (plaintiff class action seeking both injunctive and monetary relief in which the court refused to let class members opt out and said: "where a class has been certified under (b)(2), there is no requirement that notice and the right to opt out be given to class members."); *In re Jackson Lockdown/MCO*, 107 F.R.D. 703, 713 (E.D. Mich. 1985) (plaintiff class action in which the class sought both injunctive relief and damages and court certified as a mandatory class action without permission to opt out).